Supreme Court, U.S.
F I L E D

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF ARIZONA,

PETITIONER,

-VS-

MARTIN MENDOZA DUARTE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED FOR REVIEW

Where a confession was made voluntarily and with full *Miranda* warnings after the suspect agreed to accompany detectives to the police station, does the exclusionary rule require suppression of the confession and all subsequent evidence because police mistakenly kept the not-yet-arrested suspect in a holding cell prior to their interview with him?

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The decision of the Arizona Court of Appeals, *State v. Duarte*, No. 1 CA-CR 95-0452 (Ariz. Ct. App., May 23, 1996) (memorandum decision), reversing the trial court's denial of Respondent's motion to suppress, is reproduced in Appendix A.

The order of the Arizona Supreme Court filed on November 21, 1996, denying discretionary review, is reproduced in Appendix B.

The order of the Yuma County Superior Court filed on December 8, 1994, denying the motion to suppress, is reproduced in Appendix C.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the judgment and memorandum decision of the Arizona Court of Appeals, Division One. The order of the Arizona Supreme Court denying discretionary review was filed on November 21, 1996. This petition is filed within 90 days after the entry of that order as required by Rule 13 of the Rules of The Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1257(a).

PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On March 25, 1994, between 12:30 a.m. and 1:55 a.m., Respondent Martin Mendoza Duarte confessed to shooting Dr. Kenneth Uznanski, an obstetrician and gynecologist practicing in Yuma, Arizona. (R.T. of Nov. 15, 1994, at 54, 127, 133.) Duarte had become obsessed with the suspicion that the doctor may have molested Duarte's wife during obstetric examinations. (*Id.*) Duarte formed his suspicions based solely on a movie he had seen entitled, "The Hand that Rocks the Cradle." (*Id.* at 127.) Duarte confessed his crime approximately 6 hours after he voluntarily accompanied police investigators to the station house where they mistakenly placed Duarte in an empty holding cell and locked the wire mesh door in order to prevent him from wandering the patrol room. (*Id.* at 55–56, 99.)

On March 23, 1994, at around 9:00 a.m., Dr. Uznanski answered a knock at his front door and was asked by a young man, "Are you Ken or Kenneth?" (*Id.* at 38, 40.) When Dr. Uznanski answered affirmatively, the man at his door fired three shots from a .380 caliber handgun. (*Id.* at 39–40.) Two of the shots missed

Dr. Uznanski, but one of them struck him in the center of his chest and was only deflected away from the vital organs by striking a stainless steel wire placed in Dr. Uznanski's chest after recent heart surgery from which the doctor was still recovering. (*Id.* at 43.)

Neither Dr. Uznanski nor his wife, who was present, saw the gunman well enough to identify the attacker. (*Id.* at 38, 41.) Canvassing the neighborhood, police learned that Joanne Livingston and Archie Negelman had seen a black, mini-low-rider pickup truck with black camper shell bearing old California license plates in the area prior to and immediately after the shooting. (*Id.* at 44–45.) In addition, Debbie Myers from Dr. Uznanski's medical office described a similar truck at the office on the day before the shooting, occupied by an Hispanic male. (*Id.*) The occupant of the black truck appeared to be "laid back sleeping in the vehicle." (*Id.*)

On March 24th, police received an anonymous "silent witness tip" about:

> an individual, unknown person who was dissatisfied with the doctor that had delivered his child....[a]nd...that [police] could go to Richard and Rosie Ayala's residence, that they knew who this individual was.

(*Id.* at 46.) When police pursued this lead, they spoke with the Ayalas who turned out to be Duarte's in-laws. (*Id.* at 46–47.) The Ayalas told police that Duarte was their son-in-law, that he drove a black mini-low-rider pickup truck, and that they would take the police to Duarte's parents' house where Duarte was staying. (*Id.* at 47.) The Ayalas may have also confirmed that Duarte was upset with Dr. Uznanski. (*Id.*)

Police found Duarte with his black truck at his parents' house. (*Id.* at 52.) Detectives Brian Rodgers and Cesar Faz told Duarte they were investigating the shooting of Dr. Uznanski and asked to search Duarte's truck. (*Id.*) Duarte allowed police to search his truck, as well as the room in his parent's house that he shared with his wife. (*Id.* at 52–54.) Police found nothing incriminating inside the truck, but they found the birth certificate for Duarte's child in the bedroom with Dr. Uznanski's name on it. (*Id.*) Police asked Duarte and his wife if they would accompany them to the police station to talk, and both agreed. (*Id.*) Duarte also agreed to let Detective Faz drive his truck back to the police station. (*Id.*) Duarte rode with Detective Rodgers in the front seat of Rodger's

car, and Duarte was not in handcuffs. (*Id.*) During the ride, Rodgers casually explained to Duarte the purpose of the investigation. (*Id.*) The parties arrived at the police station at approximately 7:45 p.m. (*Id.*) Because the police "don't allow people to roam around in the patrol room," Rodgers, a veteran detective, placed Duarte inside one of three empty holding cells and locked the see-through metal mesh door. (*Id.* at 35, 55–56, 97.)

Detective Rodgers decided not to interview Duarte immediately because he wanted to wait for the results of the interview with Duarte's wife being conducted in another part of the station. (*Id.* at 56.) At about 9:00 p.m., Mrs. Myers arrived at the station after police called her to look at Duarte's pickup truck. (*Id.*) Myers said that the pickup looked similar to the one she saw parked at Dr. Uznanski's office but that she could not be "100 percent sure." (*Id.*) Myers also walked past Duarte in the holding cell and looked briefly at him, but she told police that she had never seen Duarte before, although "he may be the same individual, however, [she] wasn't positive." (*Id.* at 56–57.)

After this, Detective Rodgers removed Duarte from the holding cell, took him to an adjacent room, and told Duarte that he was not under arrest. (*Id.* at 57.) Rodgers asked Duarte if he had shot Dr. Uznanski, and Duarte denied that he had done so. (*Id.*) Duarte told Rodgers: that Dr. Uznanski had delivered his child 2 years before; that he did not originally know that a male doctor was involved; and that he had not wanted a male doctor examining his wife. (*Id.* at 58–59.) Rodgers told Duarte that he "believed the doctor would identify him as the shooter." (*Id.*) However, Duarte "continued to deny it." (*Id.*) This interview lasted about 30 minutes; after which, Rodgers gave Duarte some water and returned him to the holding cell. (*Id.*) Detective Rodgers conferred with Detective Faz who had "some real good information" from the interview with Duarte's wife. (*Id.* at 60.) Duarte's wife had told Faz: that Duarte "had a problem" with the fact that a male doctor had examined her; that Duarte had "told her if people came asking her about where he had been the day before . . . to tell [them] that he had been with her;" and that she was afraid of Duarte's short temper. (*Id.* at 117–18.)

Detective Faz next interviewed Duarte at around 10:00 p.m. (*Id.* at 119.) While Faz was interviewing Duarte, Mrs. Livingston came to the police station and "positively identified the pickup truck." (*Id.* at 61.) Meanwhile, Duarte told Faz that he had nothing to do with the shooting, but asked how much prison time a person could get if convicted. (*Id.* at 119–20.) Duarte asked the detective if he was under arrest, and Faz told him that Detective Rodgers would make that decision. (*Id.* at 121.) After this, Faz consulted again with Rodgers who decided to arrest Duarte. (*Id.* at 122.) Rodgers went back to Duarte's holding cell, told Duarte that he was under arrest, and read Duarte his *Miranda* rights. (*Id.* at 62–63.) Rodgers did this "about midnight, the best I can recall." (*Id.* at 63.) Either shortly before, or after, Rodgers arrested and *Mirandized* Duarte, Detective Faz went back and told Duarte "that he was going to be arrested and booked into the jail." (*Id.* at 122.) Duarte asked to go to the bathroom, and Faz accompanied him there. (*Id.* at 123.) In the bathroom, Duarte told Faz that he had not been truthful, and that he had lied because "he could not fairly represent himself." (*Id.*) Detective Faz did not respond, but rather, "pretty much let him

talk." (*Id.*) Duarte wanted to speak with his wife, and Detective Rodgers allowed it after some initial hesitation based on the wife's statement that she feared Duarte's temper. (*Id.* at 65, 124.) Duarte and his wife spoke alone in a room with a window through which police watched for about 10 to 15 minutes. (*Id.* at 65–66.) Detective Faz overheard Duarte say, "All I wanted to do was scare him." (*Id.* at 125.) Faz also heard Duarte's wife say, "You need to tell them the truth." (*Id.*)

At this point, Duarte told the police that he was "ready," Faz and Rodgers entered the room, Faz re-*Mirandized* Duarte, and Duarte confessed. (*Id.* at 66–67, 126–30.) After Duarte was unable to draft a written statement, the police *Mirandized* him a third time and tape-recorded Duarte's confession. (*Id.*)

The State charged Duarte with: attempted first degree murder, a class two felony; aggravated assault causing serious physical injury, a class three felony; and aggravated assault using a deadly weapon, a class three felony.

Duarte moved to suppress his confession citing "a whole host of cases involving fourth, fifth, and sixth amendments." (*Id.* at 163.)

On November 15, 1994, Detectives Brian Rodgers and Cesar Faz of the Yuma Police Department testified at the suppression hearing regarding Duarte's interviews. Duarte's wife and his mother testified on Duarte's behalf. At the conclusion of the hearing, the trial court took the motion to suppress under advisement. (*Id.* at 164.)

In the order denying Duarte's motion to suppress, the trial court found facts consistent with the testimony of the police officers. The trial court never decided the issue of whether or not the police had probable cause to arrest Duarte when they locked him in the holding cell. Instead, the trial court assumed Duarte's arrest was illegal, but ruled that intervening circumstances independent of the illegal arrest purged the taint from the voluntary confession. The trial court found that "the police misconduct was not particularly flagrant." Although the trial court thought Detective Rodgers' explanation for placing Duarte in the holding cell in order to prevent him from roaming the patrol room "a bit disingenuous," the trial court further found that the police conduct was not "done with any wrongful purpose or intent to humiliate, confuse, frighten, or otherwise

facilitate a confession." The trial court viewed the action "an unfortunate product of police procedural mentality."

A jury convicted Duarte of all the charges, and he appealed. On May 22, 1996, Division One of the Arizona Court of Appeals reversed. The court of appeals ruled that Duarte's confession and all subsequent evidence should have been suppressed according to United States Supreme Court precedent interpreting the Fourth and Fifth Amendments.

The State petitioned the Arizona Supreme Court for discretionary review. On November 21, 1996, the Arizona Supreme Court denied review.

REASON WHY THE WRIT SHOULD ISSUE

The police in this case made one procedural mistake in an otherwise commendable performance of criminal detection. Had Detective Rodgers seated Martin Duarte in a waiting room rather than in the station's holding cell to await the voluntary interview, no complaint against the police could have succeeded in reversing Duarte's convictions. The irony is that neither Duarte nor Rodgers believed that Duarte was under arrest when the door on the holding cell closed, or that the detention was illegal.

Members of this Court have cautioned against utilizing the exclusionary rule in "technical" cases of police misconduct like this one. *Brown v. Illinois*, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part). Moreover, a similar absence of "intimidating police misconduct" and similar intervening circumstances once convinced a minority of this Court to conclude:

> The . . . confession was not proximately caused by his illegal arrest, but was the product of a decision based both on knowledge of his constitutional rights and on the discussion with his friends.

Taylor v. Alabama, 457 U.S. 687, 701 (1982) (O'Connor, J., dissenting).

In the decade since *Taylor v. Alabama*, this Court has begun to more carefully balance the legitimate concerns for criminal procedure with society's dual needs for some adequate protection from crime and for an understandable administration of justice. *See, e.g., Arizona v. Evans*, ___ U.S. ___, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (refusing to apply exclusionary rule for court clerk's mistake); *Arizona v. Youngblood*, 488 U.S. 51 (1988) (requiring criminal defendants to show "bad faith" on part of police in due process complaint of failure to preserve evidence); *United States v. Leon*, 468 U.S. 897 (1984) (recognizing "good faith" exception to exclusionary rule). This Court should now grant this petition for writ of certiorari in order to overrule its past decisions in *Brown v. Illinois* and in *Taylor v. Alabama*.

In *United States v. Leon*, this Court held that the exclusionary rule is not a personal right of an aggrieved party, but rather, a judicially created remedy designed to safeguard Fourth Amendment rights generally through a deterrent effect. 468 U.S. at 906. Moreover, this Court warned that the indiscriminate use of the exclusionary rule can generate disrespect for the law and for the

administration of justice. *Id.* at 908. Application of the exclusionary rule in this case does not serve the rule's purpose, and it will certainly contribute to the law's disrespect. Undoubtedly, the general public will find it hard to understand how one who confessed attempted murder escapes justice on so slight a technicality as occurred during this investigation. Finally, it is unreasonable to believe that use of the exclusionary rule can deter an unconscious lapse in human judgment like the one experienced by Detective Rodgers.

This Court established an adequate safeguard for an accused's constitutional rights during custodial interrogation in *Miranda v. Arizona*, 384 U.S. 436 (1966). Some members of this Court have proposed that *Miranda* warnings be allowed to constitute the bulwark of protection that they were designed to accomplish. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200, 226 (1979) (Rehnquist, J., dissenting).

> Where police have acted in good faith and not in a flagrant manner, I would require no more than that proper *Miranda* warnings be given and that the statement be voluntary within the meaning of the Fifth Amendment.

Id. This Court should grant the instant petition for writ of certiorari in order to adopt a "good faith" exception in illegal arrest cases.

At least, this Court should grant the petition for writ of certiorari in order to overrule *Taylor v. Alabama*. If *Brown v. Illinois* remains as an addendum to *Miranda v. Arizona*, it should stand only to deter the kind of egregious police misconduct that is "calculated to cause surprise, fright, and confusion." *Brown v. Illinois*, 422 U.S. at 605. Members of this Court have proposed a distinction between cases involving "intimidating police misconduct" like the "violent" unlawful arrest in *Brown* and other cases where the arrests were ruled illegal based upon a technicality in the law. *Taylor v. Alabama*, 457 U.S. at 699–700 (O'Connor, J., dissenting). Such a distinction more wisely balances the competing concerns of liberty and safety that this Court must address.

Moreover, this Court should grant the petition for writ of certiorari in order to resolve a longstanding conflict among state courts interpreting *Brown v. Illinois* over what constitutes sufficient intervening circumstances to prevent an in-custody confession from being fruit of the illegal arrest. *Compare*, *People v. Lekas*, 155 Ill.

App. 3d 391, 508 N.E.2d 221 (1987), *cert. denied*, 485 U.S. 942 (1988) *with State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985); *Commonwealth v. Barnett*, 369 A.2d 1180 (Pa. 1977); *Gregg v. State*, 667 S.W.2d 125 (Tex. Crim. App. 1984).

Finally, this Court should grant the petition for writ of certiorari because the intended purpose of *Brown v. Illinois* has failed and unintended results have occurred. In the last 20 years untold numbers of clearly guilty persons have had their convictions reversed, or have never stood trial at all, because of some technical procedural error by police. *See, e.g., Lanier v. South Carolina*, 474 U.S. 25, 26 (1985) (armed robbery conviction vacated); *United States v. Tucker*, 610 F.2d 1007, 1013 (2d Cir. 1979) (three armed bank robbery convictions remanded); *State v. Winegar*, 147 Ariz. at 450, 711 P.2d at 589 (murder and armed robbery convictions reversed); *Commonwealth v. Barnett*, 369 A.2d at 1184 (affirming suppression of murder suspect's confession). *Brown v. Illinois* was meant to deter police misconduct; it was never intended to free the guilty. Today, this precedent does not accomplish what it intended

and only too well accomplishes what it did not. This Court should correct that mistake.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Arizona Court of Appeals.

Respectfully submitted,

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[12561]

APPENDICES

[Filed May 23, 1996]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. MARTIN MENDOZA DUARTE, Appellant.	)	1 CA-CR 95-0452 DEPARTMENT A MEMORANDUM DECISION (Not for Publication -- Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Yuma County

Cause No. SC94C20679

The Honorable Thomas A. Thode, Judge

REVERSED AND REMANDED

Grant Woods, Arizona Attorney General
by Paul J. McMurdie, Chief Counsel
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P A T T E R S O N, Judge

Martin M. Duarte ("defendant") appeals his convictions and sentences for attempted first degree murder, aggravated assault causing serious physical injury and aggravated assault using a deadly weapon. For the following reasons, we reverse and remand.

I. FACTS[1] AND PROCEDURAL HISTORY

On March 23, 1994, Dr. Uznanski was shot after he answered the front door to his home in Yuma, Arizona. The police interviewed neighbors and obtained a description of a black low-profile truck that was seen prior to and after the shooting. The next day, the Yuma Police Department received information from a silent witness that an unidentified individual, upset with the delivery of his child by Dr. Uznanski, was responsible for the shooting. The informant further directed the police to the residence of Rosie and Richard Ayala. The police went to the Ayala residence and learned that the defendant was their son-in-law, and that he drove a black low-profile truck.

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1 We view the facts in the light most favorable to sustaining the verdict. State v. Atwood, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992), cert. denied, 506 U.S. 1084 (1993).

The Ayalas informed the police that the defendant was staying with his parents. The police then went to the residence where the defendant was staying and saw a black low-profile truck parked out front. As the officers approached, they observed a car containing the defendant's wife leaving and requested that the occupants return to the house.

The defendant came outside and the police informed him that they were investigating the shooting of Dr. Uznanski. Detectives Rogers and Faz testified that they were given consent to search the defendant's car and room for weapons. The search revealed a birth certificate indicating that Dr. Uznanski delivered the defendant's child in 1991.

The detectives then requested that the defendant accompany them to the police station and he agreed. The detectives testified that the defendant was not handcuffed and rode in the front seat of an unmarked police vehicle. His wife rode to the police station in another police car.

The defendant, his wife and the detectives arrived at the police station at approximately 7:45 p.m. The defendant was locked in a

holding cell, but was told that he was not under arrest. The defendant remained in the cell while Faz questioned his wife, and Rogers called potential witnesses to come to the station to identify the defendant's truck. At approximately 9:00 p.m., a potential witness arrived. She was shown the truck and was then taken past the defendant's holding cell. She stated that the truck looked similar, but could not identify the defendant.

Around 9:15 p.m., the defendant was questioned by Rogers for approximately thirty minutes. Rogers informed the defendant that Dr. Uznanski had identfied him. The defendant, however, denied any involvement in the shooting. He was then put back into the holding cell. The defendant was later interviewed by Faz around 10:00 p.m. for approximately forty-five minutes and returned to the holding cell, after which Faz spoke with Rogers. Faz returned at approximately 11:30 p.m. and informed the defendant that he was going to be arrested.

Around midnight, Rogers placed the defendant under arrest and read him his Miranda[2] rights. Thirty minutes later, the defendant asked to speak with his wife in private. The request was granted. At the conclusion of the conversation with his wife, the defendant was interviewed again. At approximately 1:55 a.m., the defendant gave a recorded confession.

The defendant filed a motion to supress the confession made to the police officers and all the evidence obtained as a result of his confession. However, the trial court admitted the confession, and a jury trial commenced. The defendant was convicted as charged. The trial court imposed judgment and sentenced the defendant to an aggravated term of 21 years on the attempted first degree murder charge; and a concurrent, presumptive term of 7.5 years on each count of aggravated assault. The defendant raises two issues on appeal:

(1) Whether the trial court erred by denying the defendant's motion to suppress; and

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2 Miranda v. Arizona, 384 U.S. 436 (1966).

(2) Whether it was error to try the defendant by an eight-person jury.

II. DISCUSSION

A. THE DEFENDANT'S CONFESSION SHOULD HAVE BEEN SUPPRESSED

The defendant argues that the statements made to the officers should have been suppressed, even if voluntary, because they were the product of an illegal detention, citing Dunaway v. New York 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975); Taylor v. Alabama, 457 U.S. 687 (1982). He also claims that the officers failed to properly advise him of his Miranda rights. The state responds that the trial court properly concluded that there was a sufficient break in the chain of causation between the arrest and the confession to purge the taint of an illegal detention.

This court "looks only at the evidence presented to the trial court during the suppression hearing" in reviewing a trial court's ruling on a motion to suppress. State v. Spears, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). The factual determinations of the trial court are reviewed for manifest abuse of discretion. State v. Winegar, 147

Ariz. 440, 444-45, 711 P.2d 579, 583-84 (1985). This court, however, conducts a de novo review of the trial judge's interpretation and application of the law to the facts. Id. at 445, 711 P.2d at 584.

1. The Defendant's Arrest

The exclusionary rule bars the admission of "a confession obtained through custodial interrogation after an illegal arrest . . . unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" Taylor, 457 U.S. at 690 (citations omitted). The question of whether a confession is the product of a free will must be answered on the facts of each case. Brown, 422 U.S. at 603.

Here, the trial court determined, and the state does not dispute, that an arrest occurred when the defendant was locked into the holding cell. The trial court did not reach the issue of whether the arrest was supported by probable cause, but instead assumed that the arrest was illegal. It concluded that the defendant's statements to police were nevertheless admissible because intervening factors as

set forth in State v. Reffitt purged the taint of the illegal detention. These factors are as follows:

1) the voluntariness of the confession;

2) the temporal proximity between the illegal arrest and the confession;

3) the presence of intervening circumstances; and particularly,

4) the purpose and flagrancy of official misconduct.

145 Ariz. 452, 458, 702 P.2d 681, 687 (1985).

2. Application of the Reffitt Factors

The trial court determined that the defendant voluntarily confessed because he was read his Miranda rights prior to confessing. However, even if the confession was voluntary, this is merely a threshold issue because "Miranda warnings in no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody following an arrest made without warrant or without probable cause." Brown, 422 U.S. at 602 n. 6. While voluntariness is an important factor, it is not the only consideration in determining whether a defendant's Fourth

Amendment[3] rights have been violated. We therefore proceed to the next factor to determine whether there were sufficient intervening circumstances to break the causal connection between the illegal arrest and the defendant's confession.

The second factor, the temporal proximity between the arrest and the confession, was approximately five to six hours. The trial court concluded that standing alone, this time period was not an important factor. We disagree. In Taylor, the Supreme Court found that although six hours might have otherwise purged the taint, it weighed in favor of suppression where, under similar facts as in this case, the defendant was in police custody, unrepresented by counsel, questioned several times, fingerprinted and subjected to a lineup. 457 U.S. at 691. See also Winegar, 147 Ariz. at 449, 711 P.2d at 588 (temporal proximity of only three and one-half to four hours between illegal arrest and confession raises a strong presumption that statements "were obtained by exploitation of the illegality"). Compare Rawlings v. Kentucky, 448 U.S. 98, 107 (1980) (court

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3 Fourth Amendment protection is applicable to the States through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

admitted statement given within a forty-five minute interval between illegal arrest and statement due to an unusually noncoercive environment).

On this record, where the defendant was questioned several times before he was read his Miranda rights, was unrepresented by counsel, locked into a holding cell and falsely told that he had been identified by the victim, we find that the time period between the detention and the confession weighs heavily in favor of suppression.

The state submits that the trial court correctly determined that the last two factors are determinative. These intervening factors, the state contends, are the existence of probable cause at the time of the confession, even though it did not exist at the time of arrest; and that the police acted in good faith and not on a "fishing expedition" for the purpose of obtaining a confession from the defendant. The trial court reasoned that "if circumstances occur after the illegal arrest which would make the arrest legal had they been known or present at the time of the arrest, then the taint of the unlawful arrest may be lessened," citing Winegar, 147 Ariz. 440, 711 P.2d 579.

This is a misinterpretation of the exclusionary rule and its underlying purposes which seek to protect a defendant's Fourth Amendment rights in two respects:

> 'In terms of deterring lawless conduct by federal officers,' and by 'closing the doors of the federal courts to any use of any evidence unconstitutionally obtained.' . . .

Brown, 422 U.S. at 599-600 (citations omitted).

The Court further stated that:

> [t]hese considerations of deterrence and of judicial integrity, by now, have become rather commonplace. . . . 'The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.' . . .

Id.

We further note that in Winegar, it was the state which forwarded the argument that inculpatory evidence -- which was obtained after the defendant's illegal detention but before the defendant's confession -- provided a sufficient intervening event to

purge the taint of the illegal arrest. The Winegar Court rejected this argument stating that the "[i]ntervening circumstances must be independent, not the product of police misconduct." Winegar, 147 Ariz. at 450, 711 P.2d 589. To do otherwise would give law enforcement agencies:

> an unfettered discretion to illegally seize any person or any number of persons on mere suspicion secure in the knowledge that if by chance a subsequent confession is obtained by means of a confrontation with a suspected co-defendant, the illegally seized individual will not have the right to suppress the tainted confession.

Id. (quoting Commonwealth v. Wright, 460 Pa. 247, 250, 332 A.2d 809, 812 (1975) (Manderino, J., dissenting). But see and compare Reffitt, 145 Ariz. at 459, 702 P.2d at 688 (probable cause that existed before defendant's arrest found to be an intervening factor).

Here, the police did not have probable cause to arrest the defendant or to conduct a search of his house and car. The atmosphere of the police station was far from noncoercive: The defendant was locked into a holding cell, told that the victim had

identified him, interviewed several times before he received any Miranda warnings and a potential witness was led past his cell. These facts weigh heavily in favor of suppressing the defendant's confession.

The state last argues that the police action was not flagrant and did not involve purposeful misconduct. We disagree. The defendant was unlawfully detained based on an uncorroborated tip by an unidentified informant. These facts support the conclusion that the defendant was "seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance." Dunaway, 442 U.S. at 218. We therefore find that the trial court erred in denying defendant's motion to suppress his confession, all of his other statements to law enforcement authorities while he was in custody and all the evidence obtained as a result of those statements.

III. THE DEFENDANT'S TRIAL BY AN EIGHT-PERSON JURY WAS ERROR

Although the denial of the motion to suppress was reversible error, we address this issue to provide instruction upon remand. On

appeal, the defendant argued that because the trial court had the authority to impose consecutive sentences, he was facing a term of imprisonment in excess of thirty years in violation of Ariz. Rev. Stat. Ann. ("A.R.S.") section 21-102(a)[4]. The state responded that the trial court was without authority to impose consecutive sentences because under Arizona caselaw, an aggravated assault that is part of a homicide is not a separate crime, citing State v. Lopez, 174 Ariz. 131, 141, 847 P.2d 1078 (1992), cert. denied, 114 S. Ct. 258 (1993) and A.R.S. § 13-116[5]. We disagree.

The state filed a three-count indictment which charged the defendant for each shot fired. Because each act of shooting the gun constitutes a separate act, consecutive sentences are not prohibited.

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4 A.R.S. § 21-102(a) provides:

> A jury for trial of a criminal case in which a sentence of death or imprisonment of thirty years or more is authorized by law shall consist of twelve persons, and the concurrence of all shall be necessary to render a verdict.

5 A.R.S. § 13-116 provides in relevant part:

> An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent.

See e.g. State v. Gordon, 161 Ariz. 308, 315-16, 778 P.2d 1204, 1211-12 (1989); State v. Belyeu, 164 Ariz. 586, 591, 795 P.2d 229, 234 (App. 1990); State v. Alexander, 175 Ariz. 535, 537-38, 858 P.2d 680, 682-83 (App. 1993). Had the trial court imposed consecutive rather than concurrent sentences, the defendant would have received a sentence in excess of thirty years in violaton of A.R.S. section 21-102(a).

IV. CONCLUSION

The defendant's confession was the result of an illegal arrest which occured [sic] when the defendant was locked into the holding cell at the police station. The trial court erred in denying the defendant's motion to suppress his confession because intervening circumstances purged the taint of the illegal detention. The decision of the trial court is therefore reversed and this case is remanded to the trial court for proceedings not inconsistent with this decision.

/S/
Cecil B. Patterson, Jr., Judge

CONCURRING:

/S/
E.G. Noyes, Jr., Presiding Judge

/S/
Joe W. Congreras, Judge

Supreme Court
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NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

November 21, 1996

RE: STATE OF ARIZONA vs. MARTIN MENDOZA DUARTE
Supreme Court No. CR-96-0427-PR
Court of Appeals No. 1 CA-CR 95-0452
Yuma County No. SC94C20679

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 19, 1996, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Motion to Strike Pro Se Pleadings = DENIED.

FURTHER ORDERED: The State of Arizona's Request for Oral Argument = DENIED.

FURTHER ORDERED: The State of Arizona's Petition for Review = DENIED.

Justice Jones voted to grant the Petition for Review.

Record returned to the Court of Appeals, Division One, Phoenix, this 21st day of November, 1996.

NOEL K. DESSAINT, Clerk

STATE OF ARIZONA vs. MARTIN MENDOZA DUARTE
Supreme Court No. CR-96-0427-PR
Court of Appeals No. 1 CA-CR 95-0452
Yuma County No. SC94C20679
November 21, 1996

TO:

David S. Ellsworth, Yuma County Attorney
Attn: Mark Edward Hessinger, Esq.
Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq., and Crane McClennen
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West Publishing Company

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[Filed December 8, 1994]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA Plaintiff, vs. MARTIN MENDOSA DUARTE Defendant.	)	NO. C-20679 DIV 3 ORDER DENYING MOTION TO SUPPRESS

The motion to suppress was presented to the court on November 15th, 1994, and taken under advisement. The court has reviewed and researched the matter and now finds as follows:

- On or about 23 March 94 Dr. Kenneth Uznanski was shot as he came to the doorway of his home at Sheffield Estates, Yuma, Arizona.

- The victim survived the shooting but was unable to identify the assailant.

- Witnesses described a black low profile pickup with wide wheels and a black camper shell with old style California plates in the neighborhood at about the time of the shooting.

- There were no readily identifiable suspects with a motive other than possible disgruntled employees, angry patients, or the like. The investigation had begun to focus in this area.

- The doctor's office staff told the officers of a low profile black mini pickup with a black camper shell and California plates driven by an Hispanic male which had been at the office the day before the shooting.

- The police were advised by an anonymous caller that the Ayala family were related to a person who the caller suspected was the assailant.

- Members of the Ayala family told the officers that their son-in-law had a black mini pickup and his child was delivered by the doctor.

- The police received information that the defendant was upset with a doctor, but it is unclear to the court from the testimony whether this information came from the silent witness call or from the Ayala family.

- The officers went to the residence where the defendant was temporarily staying and saw the defendant's black low profile mini pickup with black camper shell and California plates in the driveway.

- The defendant is Hispanic, as is a large segment of the population in Yuma County.

- There were several officers at the scene, which was appropriate in light of violent nature of the crime under investigation.

- The officers determined that the defendant was not a resident of Arizona and was only temporarily staying with his wife's parents at that location; that he was a soldier stationed at Fort Irwin, California.

- Permission was voluntarily given to search the room where the defendant was staying and to search the mini pickup. The only result of the search was a birth certificate listing Doctor Uznanski as the attending physician at the birth of the defendant's child.

- The defendant was asked to go to the police station with the officers, which he voluntarily agreed to do. The defendant rode in the front seat of the police car and was not handcuffed or paced [sic] under arrest at that time.

- The defendant voluntarily agreed to allow the police to drive the mini pickup to the station.

- The defendant's wife voluntarily went to the police station and was not placed under arrest.

- The defendant was put in a cage or holding cell at the police station and the hasp was fastened. The court finds that an arrest occurred at this time.

- A witness from the neighborhood was unable to positively identify the defendant, but did identify the pickup as being similar.

- The defendant was taken out of the "cage" and told he was not under arrest.

- The defendant told the officers his wife had a baby two and one-half years ago, that he was in boot camp at the time and that he did not want his wife to have a male doctor. He made no substantially incriminating statements up to this time regarding any facts of which the police were not already aware. He denied the shooting.

- The defendant was put back in the cage. The court finds that he was under arrest.

- The defendant's wife told the officers that the defendant had asked her to lie and say he was with her at the time of the shooting. She also told them that she was fearful of him

and that he had behavioral problems, including a short temper and constantly cleaning himself.

- Another witness from the neighborhood positively identified the mini pickup as the one in question.

- Miranda warnings were then given and understood.

- The defendant told an officer (while in the bathroom) that he wasn't being entirely truthful

- The defendant requested permission to speak to his wife, and was allowed to do so in a separate room

- The defendant's conversation with his wife was partially overheard by an officer in an adjacent room, who heard the words "only wanted to scare him".

- No force or threats were used and the officers were polite and professional at all times. There is no evidence of trickery or overbearing tactics.

- The defendant was not deprived of food, drink, restroom facilities, sleep or other necessities or conveniences.

- The defendant was not suffering from any illness or discomfort but instead was a healthy young man in good physical condition as would be expected of one in his employment.

- The defendant then made the statements which he wishes to have suppressed.

The court does not find this case to present a serious issue under the doctrine expressed in Miranda v. Arizona as to either the warnings or voluntariness. The court finds that the Miranda warnings were given and that under the circumstances of this case, that the statement given after the warnings was a voluntary statement, freely given. See State v. Montes, 136 Ariz. 491, 667 P.2d 191

The constititutional concepts involved here are explained in the trilogy of leading cases; Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314; Dane v. New York, 442 U.S. 200, 99

S.Ct. 2248, 60 L.Ed.2d 824; and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, L.Ed.2d 416. These cases have been applied in an Arizona case closely on point, State v. Winegar, 147 Ariz. 440, 711 P.2d 579 wherein the issue was stated thusly:

> "The state maintains that the issue in this case is whether defendant's confession was freely and voluntarily made. We disagree. The issue here is not whether defendant freely and voluntarily confessed. It is whether the confession was the fruit of an illegal arrest. Obviously a confession must also be voluntary if it is to be admissible. Brown v. Illinois, supra. Mere voluntariness under Miranda, however, will not render admissible a confession obtained as the result of an illegal arrest." 147 Ariz. at 444, footnote 3.

Without reaching the question, and for the purposes of this decision, the court will assume that the police lacked probable cause at the time they arrested the defendant by putting him in the cage and closing the hasp. The court expressly finds that under the circumstances of this case that this was not a "stop and frisk" such

as would be constitutional under Terry v. Ohio 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, so we need not deal with that concept. In State v. Reffitt, 145 Arizona 452, 702 P.2d 681, the court stated:

> "The exclusionary rule bars the admission of verbal statements which constitute the fruit of an illegal arrest. See Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441,454 (1963). A confession obtained through custodial interrogation after an illegal arrest is not inadmissable merely because it would have come to light but for the illegal police conduct.... Rather, the controlling inquiry is whether the accused's confession was procured by 'exploitation' of the illegal arrest. Id.Differently stated, the question is whether there was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' Id...."145 Ariz. at 457

The Arizona courts have adopted some of the factors as set forth in U.S. Supreme Court opinions in determining whether the

confession has been "purged of the taint of the illegal arrest". These are set forth in Reffitt , supra., as follows:

- Voluntariness of the confession as a threshold requirement. (This court expressly finds this confession to be voluntary, so we have crossed this threshold)

- Temporal proximity between the illegal arrest and the confession. (The court finds this to be approximately five or six hours, and deems it to be a rather unimportant factor. Mere delay standing alone would not seem to be an attenuating factor late at night, when a person is being taken in and out of a locked cage, and subjected to intermittent interrogation.)

- The presence of intervening circumstances.

- The purpose and flagrancy of official misconduct.

The latter two factors, together with the other matter hereafter considered, are determinative of this case. We will deal first with intervening circumstances. By this the court understands that if

circumstances occur after the illegal arrest which would make the arrest legal had they been known or present at the time of the arrest, then the taint of the unlawful arrest may be lessened. State v. Winegar, supra; Dane v. New York, supra. The police had become aware of more evidence by the time of the confession which supported the anonymous tip received on the silent witness line. They knew of a black low profile mini-pickup with a camper shell near the scene at the time of the shooting, that such a pickup with California plates had been at the doctor's office before the shooting, that the defendant owned the black low profile mini-pickup with California plates and camper shell which was positively identified by a neighborhood witness, that the defendant's child was delivered by the victim, that the assailant was an Hispanic male, as was the defendant, and most importantly, that the defendant had asked his wife to make up an alibi for him and was nervously compulsive and quick tempered. These facts in light of the surrounding circumstances constitute probable cause for an arrest. Although probable cause may not have existed at the time the defendant was arrested, it existed at the time of the confession.

Unlike the statement of the codefendant in Winegar, The wife's statements here were not the result of the defendant's arrest. The wife was never placed under arrest, nor was any thing which was a product of the arrest (such as statements by the defendant) used to coerce her statement.

We now turn to the purpose of the arrest and whether it constituted flagrant police misconduct. The higher courts have found it to be purposeful misconduct for the police to arrest in an "expedition for evidence". Arizona has adopted the view that the police purpose is to be given special weight. State v. Reffitt, supra. In this case, there is no question but that the defendant was taken to the police station in the hopes that some valuable evidence may turn up, and the logical expectation was that the defendant or his wife would be the ones bringing this evidence to light. It should be kept in mind however, that at that time there was no arrest, and everyone went voluntarily. This is understandable, since the conversation could not be easily conducted by either side in the presence of all the relatives. It was only when the police put the defendant in the cage that the arrest occurred. The police explanation for their purpose for

this arrest was to the effect that they couldn't let him be wandering around the facility by himself. This seems a bit disingenuous. It is a great leap from not wanting a citizen to be aimlessly exploring your office to locing him up in a cage. The city of Yuma has a number of quiet places where conversations could be had in confidence without incarceration, however brief. Of course, these places would not have the compelling ambiance, or lack thereof, of a police station. This court does not find however that the placing of the defendant in the cage and thereby effecting an arrest was done with any wrongful purpose or intent to humiliate, confuse, frighten, or otherwise facilitate a confession. The court finds it but an unfortunate product of police procedural mentality. The putting of the defendant in the cage, although technically an arrest, did not substantially alter the situation as to the voluntariness in coming to the station and the subsequent activity. The court finds the police misconduct was not particularly flagrant.

The court finds the intervening circumstances to be the factor which tips the scale to overcome the state's burden of proof.

IT IS ORDERED the motion to suppress is denied.

DATED this 8th day of December, 1994.

_____/S/_____
THOMAS A. THODE
JUDGE OF THE SUPERIOR COURT

. . .

. . .

Copies of the foregoing placed

this 8th day of December, 1994 in

the boxes of:

Yuma County Attorney

Mike Telep

BEVERLY FRAME, Clerk of Superior Court

BY _____/S/_____
Deputy Clerk